RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-680

In the Supreme Court of the United States

GOLDEN BETHUNE-HILL, *et al.*,
Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

RESPONSE OF INTERVENOR-APPELLEES VIRGINIA HOUSE OF DELEGATES AND SPEAKER WILLIAM J. HOWELL TO APPELLANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

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"The Court has specified that those who claim that a legislature has improperly used race as a criterion, in order...to create a majority-minority district"—i.e., a district drawn to meet a 50% plus one numerical threshold—"must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles...to racial considerations.'" *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*) (quoting *Miller v. Johnson*, 515 U.S. 900, 928 (1995)). "Race must not simply have been '*a* motivation for the drawing of a majority-minority district'"; race must rather have been "'the *predominant factor*.'" *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996) and *Miller*, 515 U.S. at 916). Accordingly, the court below found as fact that race did not predominate in 11 of 12 of the Challenged Virginia Districts because Appellants failed to show that efforts to maintain the Challenged Districts around or above 55% BVAP caused any discernable departure from traditional districting criteria.

The decision of the Middle District of North Carolina in *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 482052 (M.D.N.C. Feb. 5, 2016), does nothing to help Appellants defeat those findings. Like the court below, the *Harris* court required the plaintiffs to show that the North Carolina "legislature has 'relied on race in substantial disregard of customary and traditional districting principles.'" *Id.* at *8 (quoting *Miller*, 515 U.S. at 928 (O'Connor, J., concurring)); *compare* JSA 10a (quoting same). The *Harris* plaintiffs, unlike Appellants, presented sufficient evidence to allow the North Carolina district court to conclude as a factual matter that the North Carolina "general assembly relied on race...in substantial disregard of traditional

districting principles," *id.* at *11; *see also id.* at *8 (crediting testimony that "'[s]ometimes it wasn't possible to adhere to some of the traditional redistricting criteria'" because of the 50% threshold); *id.* at *12 (finding that legislature "not only subordinated traditional race-neutral principles but disregarded certain principles such as respect for political subdivisions and compactness").[1] And, unlike in this case, the *Harris* court found no evidence that political or incumbency considerations were to blame for the bizarrely configured districts. *See id.* at *11, *14–15. These crucial factual findings in *Harris* can hardly assist Appellants here, where the district court made very different factual findings concerning both the Virginia House's adherence to traditional principles, JSA 106a-127a, and the predominance of political over racial considerations, JSA 91a-96a, 120a-124a, 128a.

Appellants emphasize North Carolina's application of a 50% BVAP threshold for drawing the districts challenged in *Harris*, but the *Harris* court expressly disclaimed that it considered this fact in isolation from its effect on the districts. *Id.* at *10 & n.2.[2] Appellants

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[1] Thus, Appellants failed to cite a single case invalidating, on racial-gerrymandering grounds, a voting district that was drawn in substantial conformity to traditional principles. *See* Motion to Dismiss at 17-21; *Bush*, 517 U.S. at 978 (states "may avoid strict scrutiny altogether by respecting their own traditional districting principles.").

[2] The *Harris* court was, besides, mistaken in asserting that this Court "has yet to decide whether use of a racial quota in a legislative redistricting plan or, in particular, use of such a quota exceeding 50 percent, establishes predominance as a matter of

also ask the Court to apply in this case the *Harris* court's finding that North Carolina's efforts to draw majority-minority districts "'rendered all traditional criteria that otherwise would have been 'race-neutral' tainted by and subordinated to race.'" Supp. Br. at 2 (quoting *Harris*, 2016 WL 482052, at *11). Yet Appellants expressly admitted at trial that *they failed to prove this occurred*. Trial Tr. 832:14-833:6 (conceding that "there were all sorts of local considerations going into drawing these districts" and that "we don't have a lot of evidence" that the House's 55% aspiration rendered any of those considerations racial).

Appellants cannot expect the Court to substitute in place of their failure to prove predominance the findings of a different court in a different state interpreting a different factual record. *See Miller*, 515 U.S. at 928 (holding that burden to prove predominance falls on plaintiffs and is "demanding"), *id.* at 916 (warning courts to exercise "extraordinary caution in adjudicating" racial-gerrymandering claims). Nor can Appellants expect the Court to find that racial "taint" occurs as a matter of law—and thereby overrule *Cromartie II*'s holding to the contrary, 532 U.S. at 242—where they have repeatedly represented that they "do not advocate a *per se* rule" against the use of numbers in redistricting. Br. in Opp. to Mot. to Dismiss at 6 n.4.

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law." 2016 WL 482052, at *10. *Cromartie II* answered that question in the negative. 532 U.S. at 242. Five justices in *Bush v. Vera* had previously reached the same conclusion. 517 U.S. at 962 (O'Connor, J., Rehnquist, C.J.), *id.* at 1008-09 (Stevens, Ginsburg & Breyer, JJ.), *id.* at 1056 (Souter, J.).

In short, Appellants' case fails because they presented no creditable evidence that the Virginia House's racial considerations impacted any district to make it meaningfully different from what it would have been if race had been completely ignored. A decision from the Middle District of North Carolina cannot give them that evidence. The Court should affirm the decision below or, alternatively, dismiss this appeal.

Respectfully submitted,

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